CAUSE NO. 18 DCR 0152

STATE OF TEXAS	§	**IN THE DISTRICT COURT**
	§	
vs.	§	**344th JUDICIAL DISTRICT**
	§	
ZENA STEPHENS	§	**CHAMBERS COUNTY, TEXAS**

STATE'S REQUEST FOR DETERMINATION THAT REDACTIONS TO MATERIALS PRODUCED BY THE STATE ARE JUSTIFIED

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the State of Texas, by and through the undersigned Assistant Attorney General, and moves the Court to determine that redactions of material produced by the State is justified under Federal law.

In her motion entitled "Defendant's Request for Discovery Pursuant to 39.14," Defendant requests that the State produce all materials subject to 39.14(a) and 39.14(b). Further, Defendant requests this Court conduct a hearing pursuant to Article 39.14(c) on "any redaction" to determine if the state can meet its burden to withhold any information. Art. 39.14(c) Tex. Code Crim. Proc. While not specifying the any documents in question, the State is only aware of redactions to portions of sixteen pages of discovery materials. Those sixteen pages are contained in three separate FD-302 documents with OAG Discovery Numbers 000919-000934. In relevant part, Article 39.14(c) states, "On request of the defendant, the Court shall conduct a hearing to determine whether withholding or redaction is justified under this article **or other law**." *Id.* (Emphasis Added). A defendant does not have a general right to discovery of evidence in possession of the State. Decisions involving pretrial discovery of evidence which is not exculpatory, mitigating or privileged are within the discretion of the trial court. *Kinnamon v. State*, 791 S.W.2d 84, 91 (Tex. Crim. App. 1990), *overruled on other grounds*, *Cook v State*, 884 S.W.2d 485 (Tex. Crim. App. 1994). In the present case, the State is making a claim of law enforcement privilege with regard to the redacted portions of the above-referenced discovery materials.

The governmental privilege, or law enforcement privilege, protects documents that, if disclosed, would "seriously hamper the function of government" or contravene the public

interest. *See United States v. Reynolds*, 345 U.S. 1, 8 [73 S.Ct. 528, 97 L.Ed. 727] (1953). The law enforcement privilege is not absolute; it must be demonstrated on a case by case basis. *Id.*

In *Reynolds*, the Supreme Court held that the government needs to show that the law enforcement privilege must be upheld or else investigations could be *seriously hampered. United States v. Reynolds*, 345 U.S. 1, 8 (1953). Under such a review, the state would need to show how the release of the non-redacted applications or related documents could be injurious to the federal investigation.

Courts have been reluctant to order disclosure of law enforcement files because of fear that such disclosure would seriously impair the prosecution's efforts by allowing a prospective defendant to ascertain the extent of the government's case against him. *Swanner v. United States,* 406 F.2d 716, 719 (5th Cir.1969) (stating that the "pendency of a criminal investigation is a reason for denying discovery of investigative reports [although it] would not apply indefinitely…); *Brown v. Thompson,* 430 F.2d 1214, 1215-16 (5th Cir.1970) (upholding the district court's decision to decline contents that were privileged because files concerned parts of a homicide investigation which was still open and the contents were highly confidential); *In re: United States Department of Homeland Security*, 459 F.3d 565, 571-72 (5th Cir. 2002) (holding that the district court erred in declaring that no law enforcement privilege existed concerning confidential documents, remanding the case to the district court).

However, more recent cases in the 5th Circuit seem to present even greater reluctance to releasing documents that could harm an ongoing investigation. Under *Swanner*, *Brown*, and *In re: USDHS*, the standard imposed under *Reynolds*, seems to be loosened significantly such that even the pendency of an ongoing investigation necessarily requires the court to uphold law enforcement privilege, requiring courts to withhold documents that could harm an investigation from court proceedings. *Campbell v. Eastland*, 307 F.2d 478, 487-88 (5th Cir. 1962); *Swanner v. United States,* 406 F.2d 716, 719 (5th Cir.1969); *Brown v. Thompson,* 430 F.2d 1214, 1215-16 (5th Cir.1970); *In re: United States Department of Homeland Security*, 459 F.3d 565, 571-72 (5th Cir. 2002).

In the present case, a federal investigation not involving Defendant as a suspect or target was being conducted. Potential criminal offenses were committed by Defendant were discovered as part of the federal investigation and turned over to State law enforcement and

prosecutors for further investigation. Redactions to the aforementioned discovery materials were made by federal law enforcement agents in order to protect ongoing federal criminal investigations.

WHEREFORE, PREMISES CONSIDERED, the State of Texas prays that the Court determine the redactions to materials produced by the state are justified or in the alternative, hold any ruling in abeyance until such time as the Court has an opportunity to conduct an *in-camera voir dire* of a federal agent with personal knowledge of the harm unredacted disclosure of said materials would cause to an ongoing federal criminal investigation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing State's Request for Determination that Redactions to Materials Produced by the State Are Justified was provided to Russell Wilson II, Chad W. Dunn, and Sean Villery-Samuel, Attorneys for the Defendant, on this the 14th day of November, 2018.

Nick A. Moutos
Assistant Attorney General